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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY TITUS BATTLE,

Defendant and Appellant.

E046873

(Super.Ct.No. RIF141956)

OPINION

APPEAL from the Superior Court of Riverside County. Paul E. Zellerbach,
Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and
Elizabeth S. Voorhies, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Timothy Titus Battle pled guilty to carrying a concealed
dirk or dagger on his person (Pen. Code, § 12020, subd. (a)(4)), and admitted four

prison priors and one strike prior. His plea was contingent on the trial court dismissing at least one of his two alleged strike priors and sentencing him between seven and 10 years, which the trial court did. Defendant contends the trial court erred in imposing the upper term, and sentencing him to a total term of 10 years.

I. BACKGROUND

On February 8, 2008, defendant was stopped by the police, admitted to having a knife on his person, and consented to being searched. A large kitchen knife was concealed in defendant's pants, with the handle sticking out but covered by his shirt.

Defendant's plea was to an indicated sentence; the People reported working toward a plea but halting negotiations after defendant engaged in discussions with his girlfriend about her plan to "get someone else to lie on his behalf at trial" and concoct "some sort of story to provide a defense."

The trial court accepted the plea and continued the *Romero*¹ motion to the date of sentencing. In weighing the factors for evaluating the *Romero* motion, the trial court stated that as to the present offense "the aggravating facts do not really occur until after this case is filed." The trial court also stated that it "listened to the phone conversation—or seen the transcript of them [sic]—and [it got] the impression then that it was [defendant's girlfriend] that was basically the one who was kind of promoting this story." The court went on to state that it thought the girlfriend was more culpable and that defendant was just going along with it. The trial court then evaluated

¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

defendant's substantial, but nonviolent, criminal history and concluded that defendant was "outside the spirit of the three-strikes scheme" and dismissed one of defendant's two strikes.

The probation report recommended defendant be sentenced to the midterm, balancing one mitigating and three aggravating factors: early voluntary acknowledgment of wrongdoing (Cal. Rules of Court, rule 4.423(b)(3)) as a factor in mitigation; indication of planning (Cal. Rules of Court, rule 4.421(a)(8)), the numerous prior convictions (Cal. Rules of Court, rule 4.421(b)(2)), and the prior service of a prison term (Cal. Rules of Court, rule 4.421(b)(3)), as factors in aggravation. The People argued that "proposing perjured testimony [was] a great aggravating fact that would warrant [the] upper term." Defendant argued that the low term was appropriate based upon the offense, "and that that would be aggravated by the conduct that [defendant] arguably engaged in on the phone call that we never had a trial on those facts, taking them to be true at this stage . . . [so] the middle term would be fair."

The trial court commenced its ruling by restating the probation report's recommendation that the midterm of imprisonment was appropriate, but then noting that probation "did not factor in or take into consideration this situation wherein [defendant] engaged in these conversations with [his girlfriend], attempting or conspiring to support perjury at [defendant's] trial." The trial court also felt that defendant's violation of parole four out of five times he has been on parole supported imposition of the upper term. After listing these two additional factors warranting an aggravated sentence, which were not included in the probation report, the trial court then imposed a total

sentence of 10 years. The court reached 10 years by doubling the three-year upper term and adding four consecutive one-year terms for each of defendant's prison priors.

The record on appeal originally only included the reference, in the People's opposition to defendant's *Romero* motion, that recordings had been obtained (and provided to defendant) of defendant's conversations with his girlfriend. However, the trial court's statements about a transcript or recordings of defendant's conversations appeared to indicate that the trial court reviewed the conversations. Accordingly, we requested the trial court determine, at a hearing to settle the record, how the court came to review the conversations, and if the conversations were properly before the trial court to forward a copy of the transcripts or recordings reviewed by the trial court.

At the hearing, the trial court indicated it did not review a transcript or recording of any conversation. Instead, the trial court "accepted the People's representation at face value because the defense didn't really object." Trial counsel for the defendant confirmed that she "didn't object to the facts as represented by [the People]" but noted that she had pointed out that a trial was not held "on the facts that were represented by [the People]." The trial court also reiterated that "[it] didn't base [its] imposition of the upper term solely upon [defendant's] telephone conversations. [It] considered all of the factors that [it] previously stated or set forth at the sentencing hearing, as well as primarily his criminal history, and record, and background in concluding that the upper term is appropriate."

II. STANDARD OF REVIEW

Sentencing decisions are reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Defendants bear a heavy burden when attempting to show an abuse of discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) “ ‘In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

III. DISCUSSION

Defendant contends that the trial court should not have imposed the upper term because (1) there were no specific findings that each element of a judicial interference crime was met, (2) there was no substantial basis to support a judicial interference finding, and (3) mitigating circumstances meant the offense was not worse than ordinary. Because the trial court had numerous aggravating factors to support its imposition of the upper term without the necessity of relying on defendant’s conversations about perjury, we find no abuse of discretion and do not address defendant’s contentions regarding the use of his conversations regarding perjury.

In reviewing for abuse of discretion, we may not substitute our judgment for that of the trial court. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Even if we might have ruled differently in the first instance, we will affirm the trial court’s ruling as long as the record shows the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law. (*Id.* at p. 378.) A single aggravating

circumstance is sufficient to make a defendant eligible for an upper term and for the trial court to impose an upper term sentence. (*People v. Black* (2007) 41 Cal.4th 799, 813, 815 (*Black II*).)

The trial court acknowledged the three factors in aggravation (planning, priors, and prison term) and single mitigating factor (early acknowledgment of wrongdoing) listed in the probation report. The trial court noted another telling factor in aggravation—defendant’s violation of parole four out of the five times he was on parole. Defendant’s telephone conversations about perjury were only one of five aggravating factors, which the trial court made clear was *not* the sole basis for its selection of the aggravated term. Thus, even if the trial court erred in considering defendant’s perjury conversations, there were still four factors in aggravation against a single mitigating factor. Given that a single aggravating circumstance is sufficient for the imposition of an upper term sentence, and that we do not reweigh the factors ourselves, we find no abuse in the trial court imposing the upper term, because even if the perjury conversations were improperly considered, there were four valid factors in aggravation.

At the trial court level, the parties agreed that defendant’s carrying of the concealed knife was not in itself egregious, and the trial court agreed that the offense was not “extremely serious or dangerous.” Defendant contends that his offense was milder than the ordinary such offense and that the trial court’s agreement that the offense was not “extremely serious or dangerous” is inconsistent with an aggravated sentence. We are not persuaded because factors in aggravation and mitigation need not

necessarily relate to the nature of the offense. In the present case, defendant's early acknowledgement of wrongdoing, prior convictions, prison terms, and multiple failures to comply with terms of parole, were all valid factors for the trial court to weigh that had nothing to do with the egregiousness of defendant's offense.

Accordingly, we find no abuse of discretion.

IV. DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.